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SUPREME COURT, U.S.

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December 6, 1983

Alexander L. Stevas, Clerk
Supreme Court of the United States
1 First Street, N. E.
Washington, D. C. 20543

Re: Escambia County, Florida, et al. v. Henry T. McMillan,
et al., No. 82-1295 (U.S.)

Dear Mr. Stevas:

This is to advise the Court of recent developments in the above-referenced action which concern the representation by the undersigned counsel.

This action was brought against Escambia County, Florida ("Escambia") and the individual members of the Escambia Board of County Commissioners ("County Commission") in their individual and official capacities. See Brief of Appellants at ln. 1, 6, 7n. 25. The suit challenged the at-large system of electing Escambia's county commissioners provided for by Fla. Const. art. VIII, §1(e). The undersigned counsel was retained by the Commissioners in office when the suit was filed to represent them and Escambia against the claim that the at-large election system violated the constitutional and statutory rights of appellees.

The original, individual appellants in the instant appeal were elected under the at-large election system in issue or were substituted in office by the Governor of Florida, under Florida law, for persons elected under the at-large system. Those original appellants are: Chairman Kenneth J. Kelson ("Kelson"); John E. Frenkel, Jr. ("Frenkel"); Billy G. Tennant ("Tennant"); Gerald Woolard ("Woolard"); and Marvin Beck ("Beck"). These persons, who comprised the County Commission, unanimously voted for counsel to appeal the decision by the United States Court of Appeals for the Fifth Circuit herein appealed to this Court, and counsel have acted pursuant to those instructions.

The Fifth Circuit's decision invalidated the at-large election system, upheld the district court's imposition of a judicially created, single-member district election system and apportionment plan and remanded the case to the district court to revise the scheduling terms of the remedial order. Id. at 19-20. The original appellants requested a stay of mandate which, on November 23, 1983, the Fifth Circuit denied. Id. at 20n. 98.

As a result, they next applied for a stay of the Fifth Circuit's judgment pending appeal or an order allowing elections to proceed under the at-large system challenged in this suit. On December 2, 1982, Justice Powell denied the application. Id.

On remand, the district court held several hearings, received briefs and, on March 11, 1983, issued an Order, McMillan v. Escambia County, Florida, PCA No. 77-0432 (N.D. Fla. Mar. 11, 1983), appeal docketed, No. 83-3275 (11th Cir. Apr. 27, 1983), petition for cert. before judgment denied, U.S., 104 S.Ct. 108 (1983), implementing its interpretation of the Fifth Circuit's mandate. The original appellants again requested a stay pending appeal of the Fifth Circuit's judgment, together with the district court's Order issued in consequence of that judgment, and an order directing elections to go forward under the at-large system. Alternatively, appellants requested a stay of elections pending the Court's disposition of the appeal. On May 26, 1983, Justice Powell denied that application. Id.

Pursuant to the district court's Order, elections under the court's single-member district system and apportionment plan were held on November 1, 1983. The following persons were elected: Kelson; Phil Waltrip ("Waltrip"); Grady Albritton ("Albritton"); Max Dickson ("Dickson") and Willie J. Junior ("Junior").

Appellees then filed in the district court a motion to dismiss original Commissioner appellants in their individual capacities. In response to the filing of that motion, appellants moved this Court for an order maintaining the status quo pending appeal with respect to the parties and the case. On or about November 10, 1983, appellees filed in the district court a motion to withdraw their motion to dismiss, and, on November 14, 1983, this Court denied appellants' motion for an order maintaining the status quo.

On November 15, 1983, the persons elected under the district court's single-member district system and apportionment plan assumed office. On December 1, 1983, Waltrip, Albritton and Junior voted "to withdraw" the appeal in this Court. Chairman Kelson and Dickson voted against any such withdrawal. As a result of the vote, the following telegram was received:

Charles S. Rhyne
1000 Connecticut Ave Northwest Suite 900
Washington, D. C. 20036

This is a confirmation copy of a telegram addressed to you:

Re Cases 82-1295 and 83-3275

Direct that you substitute recently elected commissioners for those commissioners not reelected. The names of the recently elected commissioners were provided at an earlier date to your office. Direct that you immediately file appropriate motions to withdraw the appeals in both cases.

Thomas R. Santurri
Escambia County Attorney
Courthouse Annex 4th Floor
Pensacola, Fla 32501

However, by letters to counsel, Chairman Kelson and Dickson specifically requested the undersigned counsel to go forward on their behalf with the appeals. In addition, the other, original Commissioner appellants — Beck, Tennant, Frenkel and Woolard — made the same request.

These circumstances have placed the undersigned counsel in a possible conflict of interest position. The persons elected under the district court's single-member district election system and apportionment plan are the direct beneficiaries of the relief appellees have sought. Indeed, one of those elected, Junior, is a member of the appellee class and, as such, is an appellee in this case. It was his vote that resulted in the 3-2 decision by the recently elected persons which has led to the situation herein described. 1/

On the other hand, there may be no doubt as to Chairman Kelson's right to go forward with this appeal. Kelson was elected under the at-large system and was in office at the time this suit was commenced. The suit was brought against him both in his individual and official capacities. He was a commissioner at all times from the commencement of the suit until those elected under the district court's Order assumed office; and he is one of the persons who was elected and has assumed office under that Order. Further, he has been elected Chairman.

The only matters remaining at present in this appeal are the brief in reply to the Brief of Appellees and the oral argument, which has been scheduled for January 10, 1984. This case involves issues of paramount nationwide importance to the many municipalities whose governing officials are elected at-large. Because Chairman Kelson was among the persons who originally retained the undersigned counsel, because his current position is fully consistent with the purposes for which counsel has been retained and because any other course of action would deny him his right to appeal, counsel have decided that they must continue to represent Chairman Kelson, and to go forward on his behalf with the appeal. Further, counsel is prepared to represent the interests of the other, original Commissioner appellants, all of whom have requested them to do so, as well as the interests of Dickson.

As a result of the above, the undersigned counsel are unable to represent

1/In this regard, it is noteworthy that in a similar situation, the Honorable Virgil Pittman recently issued the following order:

Commissioners Cox and Gilliard are ENJOINED from voting on whether an appeal should be taken. They were elected from the single-member districts established by this court's orders of December, 1976. The other four members of the board at this time were all elected at-large...and were members at the time of the December, 1976 orders. It would be inequitable and unfair to permit voting on this issue by board members elected as a result of an order of this court. It would also be unfair not to let all board members elected at-large vote on an appeal.

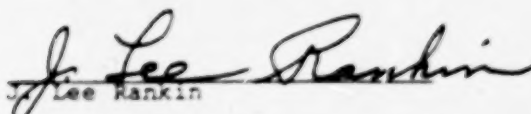
Brown v. Board of School Comm'rs of Mobile County, Ala., Civ. Act. No. 75-298-P, (typescript op. at 3, (S.D. Ala. May 12, 1982) (Final Judgment and Injunction).

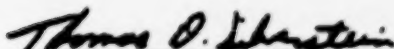
the interests of Junior, Albritton and Waltrip. The status of Junior as an appellee emphasizes the conflict which has led to this decision. Thus, the undersigned counsel are withdrawing from any representation of Junior, Waltrip and Albritton and only will represent Chairman Kelson, Dickson, Frenkel, Tennant, Woolard and Beck.

Unless the Court otherwise directs, the undersigned counsel will file a reply brief and will appear at the argument on January 10, 1984, on behalf of Chairman Kelson, Dickson, Frenkel, Tennant, Woolard and Beck.

Sincerely,


Charles S. Rhyne
(Counsel of Record)


J. Lee Rankin


Thomas D. Silverstein

CSR:mm

cc: All Counsel and
All Persons Named Above

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

ESCAMBIA COUNTY, FLORIDA, et al.,

Appellants,

v.

HENRY T. McMILLAN, et al.,

Appellees.

NOTICE OF SUBSTITUTION OF PARTIES
AND
MOTION TO DISMISS THE APPEAL

NOTICE IS HEREBY GIVEN that the Defendants-Appellants, Escambia County, Florida, and the Members of the Escambia Board of County Commissioners through undersigned counsel would show unto the Court as follows:

1. Pursuant to the elections held on November 1, 1983 and certified by the Supervisor of Elections on November 2, 1983, the following persons are substituted as Members of the Defendant-Appellant, Escambia County Commission:


Phillip M. Waltrip
Kenneth J. Kelson
Willie J. Junior
Max L. Dickson
Grady Albritton

2. Defendants-Appellants, Escambia County, Florida through its Board of County Commissioners move to dismiss this appeal as to Escambia County, Florida and its Board of County Commissioners.

3. Defendants-Appellants, Willie J. Junior, Phillip M. Waltrip and Grady Albritton, move to dismiss the appeal as to these Defendants in their individual capacity.

4. The Defendants-Appellants Kenneth J. Kelson and Max L. Dickson, in their individual capacity, do not join in this Motion.

Respectfully submitted this 5th day of December, 1983.


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(202) 466-5420

Attorneys for Appellants

CERTIFICATE OF SERVICE

I, Thomas R. Santurri, hereby certify that on this 5th day of December, 1983, I caused to be served one copy of the foregoing Notice of Substitution of Parties and Motion to Dismiss the Appeal on the following:

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Larry T. Menefee
Blacksher, Menefee and Stein, P.A.
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(Counsel for Appellees)

by Federal Express, postage prepaid, and,

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Joe Oldmixon
Room 400, County Courthouse
Pensacola, Florida 32501
(Supervisor of Elections for Escambia County, Florida)

Gerald Woolard
8485 B Mile Creek Road
Pensacola, Florida 32506
(Former County Commissioner)